Supreme Court, U.S.
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No. 93-584

In The

Supreme Court of the United States

October Term, 1993

S.J.T. INC., d/b/a T J SMILES,
and JAMES FENIMORE,

Petitioners,

v.

RICHMOND COUNTY, GEORGIA,
and CHARLES WEBSTER, SHERIFF,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the ruling of the Georgia Supreme Court holding that Richmond County, Georgia's Nude Dancing Ordinance is constitutional?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Introduction and Statement of the Case 1

Argument and Citation of Authority 2

I. Under the Constitution of the United States, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises 2

II. Under the Constitution of the State of Georgia, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises 4

III. Richmond County's nude dancing ordinance is narrowly tailored to further the County's important or substantial governmental interests and is not subject to the deficiencies found in other legislation found to be unconstitutional 6

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Barnes v Glen Theater, Inc., 501 U.S. ___, 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991) 2, 6

California v LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L.Ed. 2d 390 (1972) 3, 4

Gravely v. Bacon, 263 Ga. 203, 429 S.E. 2d 663 (1993) 6

Harris v Entertainment Systems, Inc., 259 Ga. 701, 386 S.E. 2d 140 (1989) 4, 5, 6, 7, 8, 9

Paramount Pictures Corporation v Busbee, 250 Ga. 252, 297 S.E. 2d 250 (1982) 4, 5, 6, 7

S.J.T., Inc. v Richmond County, 263 Ga. 267, 430 S.E. 2d 726 (1993) 8

U.S. v O'Brien, 391 U.S. 367, 885 S. Ct. 1673, 20 L.Ed. 2d 672 (1968) 2, 3, 6, 7

INTRODUCTION AND STATEMENT OF THE CASE

In their petition, Petitioners include a detailed description of the course of proceedings below. For the most part, the information provided is correct. However, there are several important points needing clarification. On page 5 Petitioners assert that they "had all necessary licenses by mid-1992, which placed no limit on presenting nude dancing in combination with the sale of alcohol." This statement is misleading. The liquor license obtained by Petitioners does not establish any vested right, contractual or otherwise, to operate a bar and offer nude dancing. In fact, at the time Petitioners obtained their liquor license, Richmond County's nude dancing ordinance was in full force and had the effect of expressly prohibiting Petitioners from offering nude dancing on the licensed premises.

Respondents strongly disagree with Petitioners' contention at page 9 that "the ordinance makes nude dancing illegal if and when the gross annual income from alcohol sales is twenty (20%) percent or more." The pertinent language of the ordinance is found in Section 2, Paragraph 3 and provides:

> . . . however that nothing contained in this Section 2 shall apply to the premises of any mainstream performance house, museum or theater *which derives less than twenty (20%) percent of its gross annual income from the sale of alcohol beverages.* (Emphasis added).

This qualifying language is a further description and definition of mainstream performance houses, museums or theaters to which the ordinance does not apply. In no way does this language mean that any nude dancing bar

that derives less than twenty (20%) percent of its income is exempt from the ordinance. This point is developed further herein at page 8.

With the exceptions noted above, Respondents are satisfied with Petitioners' statement of the case and proceedings below. As is shown herein, Richmond County's nude dancing ordinance passes constitutional muster, and the opinion of the Georgia Supreme Court does not conflict with any decision of this Court.

ARGUMENT AND CITATION OF AUTHORITY

I. Under the Constitution of the United States, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises.

In *Barnes v Glen Theater, Inc.*, 501 U.S. ___, 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991), this Court ruled that application of Indiana's public indecency statute to non-obscene nude dancing does not violate the First Amendment's Free Speech Clause. Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, conceded that nude dancing is expressive conduct that is "marginally" within First Amendment protection. The Court then applied the four prong test for expressive conduct found in *U.S. v O'Brien*, 391 U.S. 367, 885 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Under *O'Brien*, a government regulation is sufficiently justified if: 1) it is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression;

and 4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien, supra* at 376-377. In applying Indiana's public indecency statute to the *O'Brien* test, this Court observed that even though there was no legislative history to show what governmental interest the Indiana legislature had in mind in enacting the statute, the history of similar enactments shows that they were aimed at protecting public order and morals. The Court found this interest to be substantial and that protecting it was within the constitutional power of government. Thus, the first two prongs of the *O'Brien* test were met. The Court then concluded that Indiana's interest in regulating nude dancing was unrelated to the suppression of free expression and that the statute's clothing requirement was narrowly tailored to achieve the state's purpose.

In *California v LaRue,* 409 U.S. 109, 93 S. Ct. 390, 34 L.Ed. 2d 390 (1972), this Court upheld a California nude dancing statute substantially identical to Richmond County's ordinance approved below. In *LaRue,* the California Department of Alcoholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. The State regulations were challenged, not in the context of censorship of a dramatic performance in a theater, but rather in the context of licensing bars and nightclubs to sell liquor by the drink. *LaRue,* 409 U.S. at 114. A three judge district court panel held that the California regulations were invalid under the First and Fourteenth Amendments. In reversing the district court, this Court observed:

> But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

409 U.S. at 118.

The decision rendered by the Supreme Court of Georgia in this case is completely consistent with these prior decisions of this Court.

II. Under the Constitution of the State of Georgia, Richmond County has the authority to regulate and ban nude dancing in establishments where alcoholic beverages are sold for consumption on the premises.

The Supreme Court of Georgia has addressed the constitutionality of nude dancing ordinances in several recent decisions. In *Harris v Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E. 2d 140 (1989), the Court relied on a traditional First Amendment analysis to determine whether a state statute prohibiting nude dancing was a valid exercise of police power. In doing so, the Georgia Court re-affirmed the three part test set forth in *Paramount Pictures Corp. v Busbee*, 250 Ga. 252, 297 S.E. 2d 250 (1982). Under the *Paramount* test, a statute will be upheld even though it infringes upon protected expression: (1) if it furthers an important government interest; (2) if the government interest is unrelated to the suppression of

speech; and (3) if the incidental restriction of speech is no greater than is essential to the furtherance of that interest.

The state statute involved in the *Harris* case contained no statement of the governmental interest sought to be achieved. However, the Court assumed that the important governmental interest was the prevention of otherwise illegal activity found to be associated with establishments offering nude dancing and alcohol. The Court further assumed that the statute in question furthered that governmental interest. Thus, the first two parts of the *Paramount* test were satisfied.

The statute under examination in *Harris* was struck down by the Georgia Supreme Court only after it failed the third prong of the *Paramount* test because the restrictions on free speech were determined to be greater than what was essential to further the important governmental interest. The Court noted that the explicit terms of the statute went well beyond prohibiting nude dancing in bars:

> This Act applies to a host of other establishments besides bars. For example, the Act would apply to so-called mainstream performance houses and museums, which need licenses to sell alcoholic beverages to their patrons for consumption on the premises. Appellants do not argue that the legislature found the combination of alcohol and the depictions of nudity an undesirable mix at these establishments or that it had even intended to proscribe the mix at museums, at the opera, or at mainstream performance and movie theaters. (Footnote omitted). With regard to bars, the Act, under any reasonable construction, would prevent a bar from turning a television set on where a soap opera or movie depicts simulated sexual intercourse, also proscribed by the Act. The Act goes

> well beyond the argued governmental interest and substantially infringes upon other protected expression. Therefore, the incidental restriction of expression is greater than is essential to the furtherance of the governmental interest and the Act must fall as an improper exercise of the State's police power.

259 Ga. 701, 703-704, 386 S.E. 2d 140, 142-143.

Through the *Harris* case, the Georgia Supreme Court recognized that narrowly tailored restrictions on nude dancing would survive a constitutional challenge. The Georgia Supreme Court did, in fact, approve the City of Smyrna's nude dancing ordinance just one month before approving the ordinance at issue in this case. See *Gravely v. Bacon*, 263 Ga. 904, 427 S.E. 2d 264 (1993). It is particularly noteworthy that the Georgia Supreme Court did not have the benefit of the more recent First Amendment analysis found in this Court's decision in *Barnes v Glen Theater, Inc., supra* when it decided *Harris*.

III. Richmond County's nude dancing ordinance is narrowly tailored to further the County's interests and is not subject to the deficiencies found in *Harris*.

Richmond County's ordinance, as amended, satisfies both the *O'Brien* test and the *Paramount* test in every respect. First, the important governmental interests sought to be achieved are clearly and specifically set forth in the preamble to the ordinance. These governmental interests are unrelated to the suppression of speech. Thus,

both the *O'Brien* and the *Paramount* threshold tests are easily met.

The restrictions contained in Richmond County's ordinance, as amended, are no greater than what is essential to further an important governmental interest, i.e. the prevention of nude, barroom dancing because of the illegal activity that often results at such establishments. The ordinance's restrictions on nudity and nude dancing are limited to premises licensed to sell, serve, or dispense alcoholic beverages for consumption on the premises. The restrictions apply only to *live* "adult" entertainment, not the showing of television programs. In response to the deficiency noted in *Harris*, the ordinance expressly excludes mainstream performance houses, museums, or theaters which derive less than twenty percent (20%) of their gross annual income from the sale of alcoholic beverages.

In their petition, petitioners argue that the "mainstream" exception referenced above and found in Section 2, paragraph 3 of the amended ordinance is the County's Achilles' heel. Petitioners devote a large portion of their petition advancing several theories on why the "mainstream" exception renders the ordinance unconstitutional. While these pages may well be full of entertaining reading and clever rhetorical questions, the arguments advanced were held by the Georgia Supreme Court to be insignificant and legally irrelevant. As previously stated, Richmond County's governmental interest furthered by the nude dancing ordinance is the prevention of the otherwise illegal activity found to be associated with bars offering nude dancing and alcohol. Richmond County has not found it necessary to proscribe the combination of

alcohol and brief depictions of nudity at "mainstream" performance houses such as the opera, museums, and movie theaters.

Apparently, Petitioners have difficulty understanding the exception found in Section 2, paragraph 3 of the amended ordinance, which is set forth below:

> . . . however, that nothing contained in this Section 2 shall apply to the premises of any mainstream performance house, museum or theater *which derives less than twenty (20%) percent of its gross annual income from the sale of alcohol beverages.* (Emphasis added).

The plain and simple language emphasized above is clear evidence of Richmond County's concerted effort to narrowly tailor its ordinance to achieve the stated governmental purpose. The limiting language is used to further define mainstream performance houses, museums or theaters and is, at worst, surplusage. Even Petitioners must concede that "mainstream" performance houses derive the majority of their income from ticket sales or benevolent contributions, not alcohol sales.

The Supreme Court of Georgia has recognized that Petitioners' nude dancing bar could not be considered a mainstream performance establishment. *S.J.T., Inc. v Richmond County,* 263 Ga. 267, 270, 430 S.E. 2d 726, 730 (1993). (*See* also *Harris v Entertainment Systems,* 259 Ga. 701, 704 (1989), Fn. 2 where a similar nude dancing club, The Gold Club, did not purport to be a mainstream performance establishment.) Thus, the argument of Petitioners that they should be allowed a one year "grace period" to establish whether they derive less than twenty (20%)

percent of their annual income from alcohol sales is fallacious. The decision by Petitioners to rest their case on the exception found in Section 2, paragraph 3 of the ordinance is predictable but ill advised according to the Georgia Supreme Court.

As amended, Richmond County's ordinance clearly and specifically describes the activities prohibited or restricted and is free from and responsive to the deficiencies noted in the statute under review in the *Harris* case.

CONCLUSION

Richmond County's nude dancing ordinance is narrowly tailored to achieve its stated end and does not unnecessarily infringe on protected speech. The decision of the Georgia Supreme Court declaring the ordinance constitutional does not in any way conflict with any decision of this Court. As a result, the Petition for a Writ of Certiorari should be denied.

This 10th day of November, 1993.

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